The Re-Globe Jean Monnet Module

Università di Bologna, Ravenna

INSTITUTE OF STATE AND LAW

Centre for Climate Law and Sustainability Studies (CLASS)

Corporate climate litigation

Photo by Li-An Lim on Unsplash

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Outline

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I. Climate change litigation – scope, functions

II. Corporate climate litigation and case studies

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Climate change litigation

Paris Agreement's objectives (2015)

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Article 2
This Agreement, in enhancing the implementation of the Convention, including its objective, **aims to strengthen the global response to the threat of climate change**, in the context of sustainable development and efforts to eradicate poverty, including by:

(a) Holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change;

Article 4 (1)
In order to achieve the long-term temperature goal set out in Article 2, Parties **aim to reach global peaking** (..) and to undertake **rapid reductions thereafter** in accordance with best available science, so as **to achieve a balance between anthropogenic emissions by sources and removals by sinks** of greenhouse gases **in the second half of this century….**

Climate change litigation

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Narrow definition

'[A]ny piece of federal, state, tribal, or local administrative or judicial litigation in which the party filings or tribunal decisions directly and expressly **raise an issue of fact or law regarding the substance or policy of climate change causes and impacts**.' (David Markell and J.B. Ruhl, 'An Empirical Assessment of Climate Change in the Courts: A New Jurisprudence or Business as Usual?' 64 Fla. L. Rev. (2012) 15, 27)

Broad definition

'There is a need for concepts of climate litigation that are able to capture **lower-profile cases** where **climate change is more peripheral to arguments in, or the motivation** for, the lawsuit.' (Jacqueline Peel and Jolene Lin 'Transnational Climate Litigation: The Contribution of The Global South' 113 AJIL (2019) 679, 691)

Function

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- For pressuring **governments** to adopt and implement more ambitious climate policies
- For holding major greenhouse gas emitting **corporations** accountable for climate impacts

- **Limit GHG emissions**
- **Adaptation** to the impacts of climate change
- **Order the government to take stronger climate action** (issue of separation of powers!)
- **Permitting**
- **Compensation** for the victims of climate change damages
- **Stop greenwashing**
- **Raise public awareness**

https://www.youtube.com/watch?v=SN9edy4nvss

Trends

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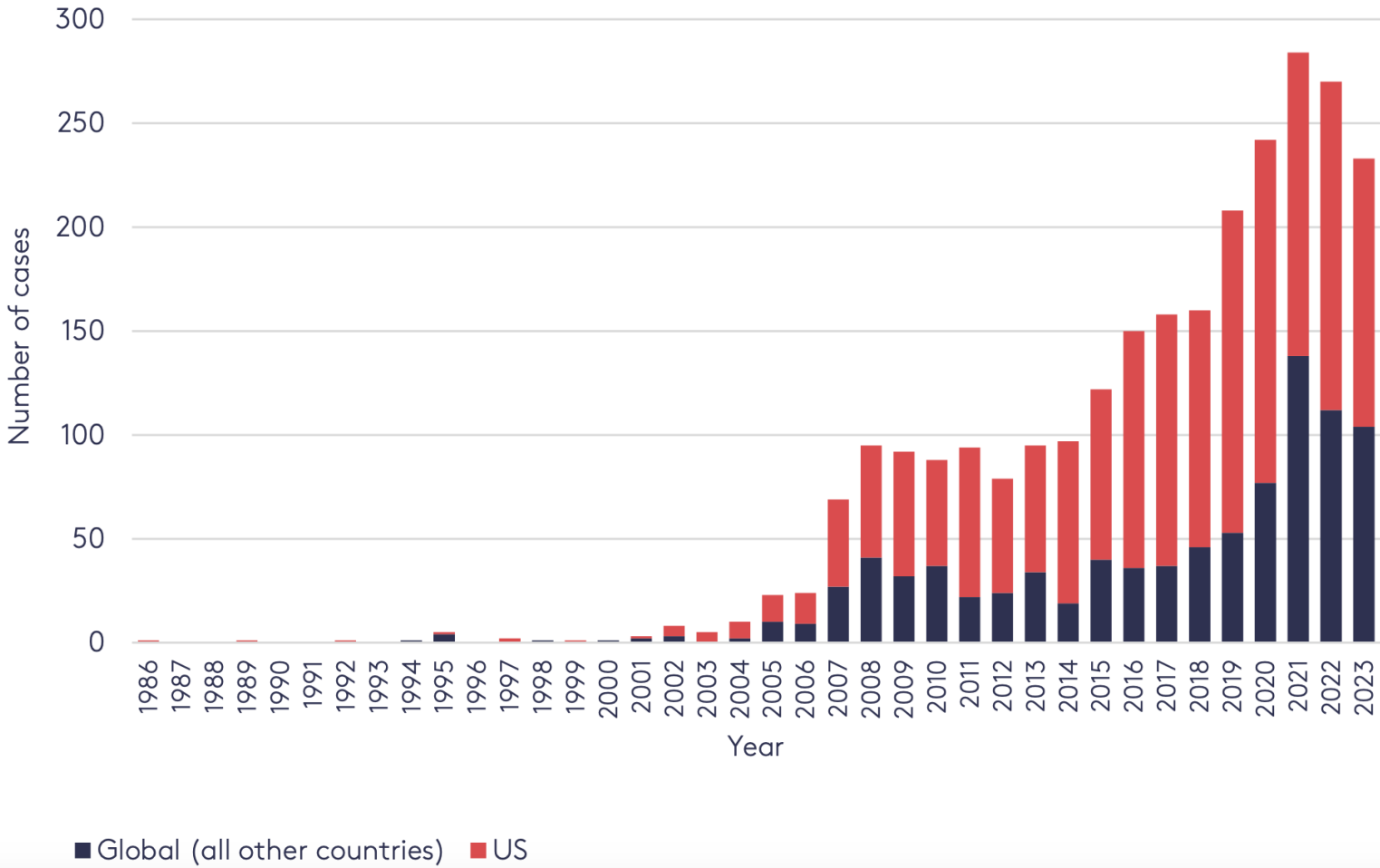
Figure 1.1. Number of climate litigation cases within and outside the US, 1986–2023



Source: Setzer J and Higham C (2024) *Global Trends in Climate Change Litigation: 2024 Snapshot.* London: Grantham Research Institute on Climate Change and the Environment, London School of Economics and Political Science.

Trends

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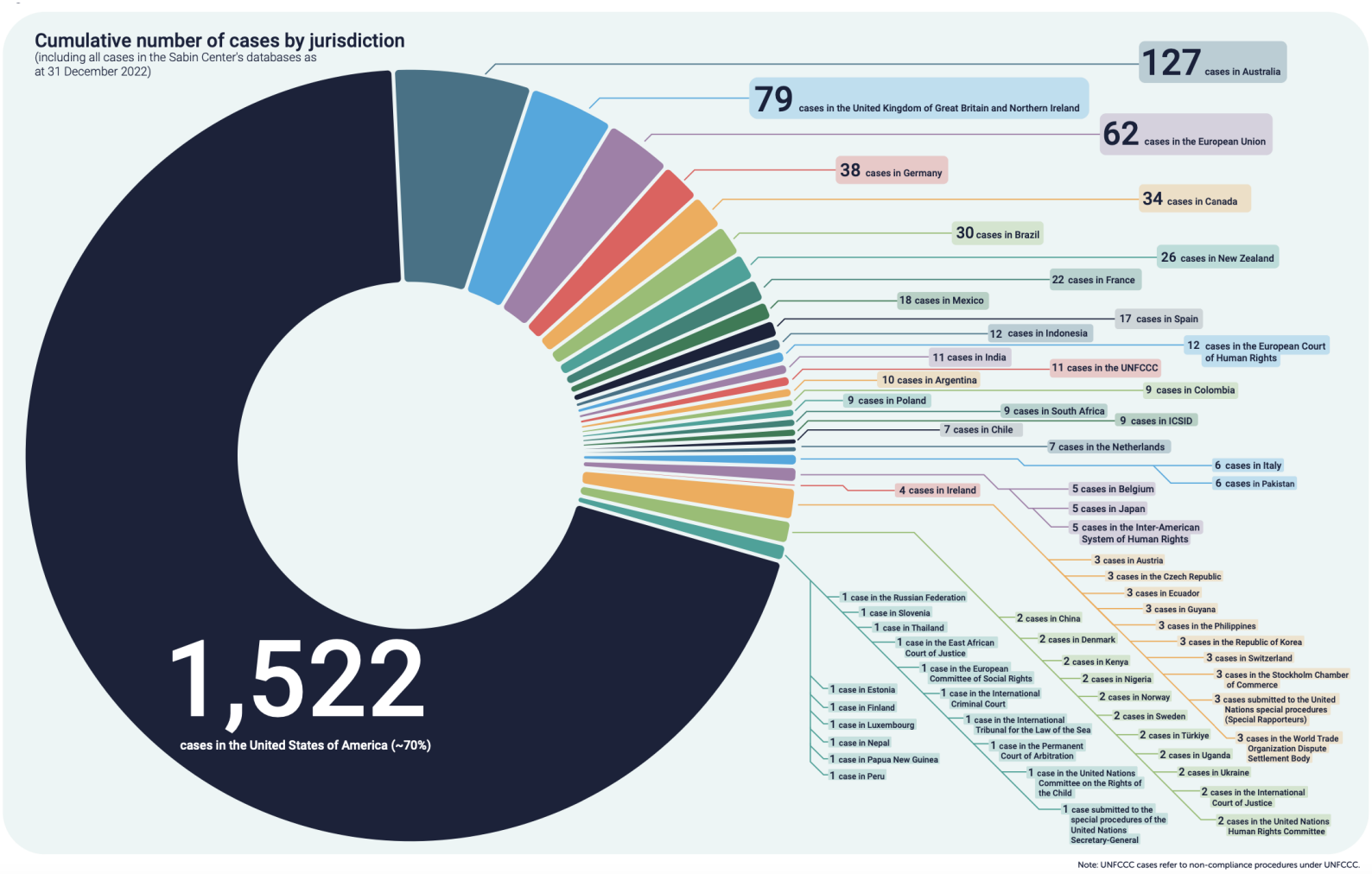

Source: UNEP, Global Climate Litigation Report: 2023 Status Review

Trends

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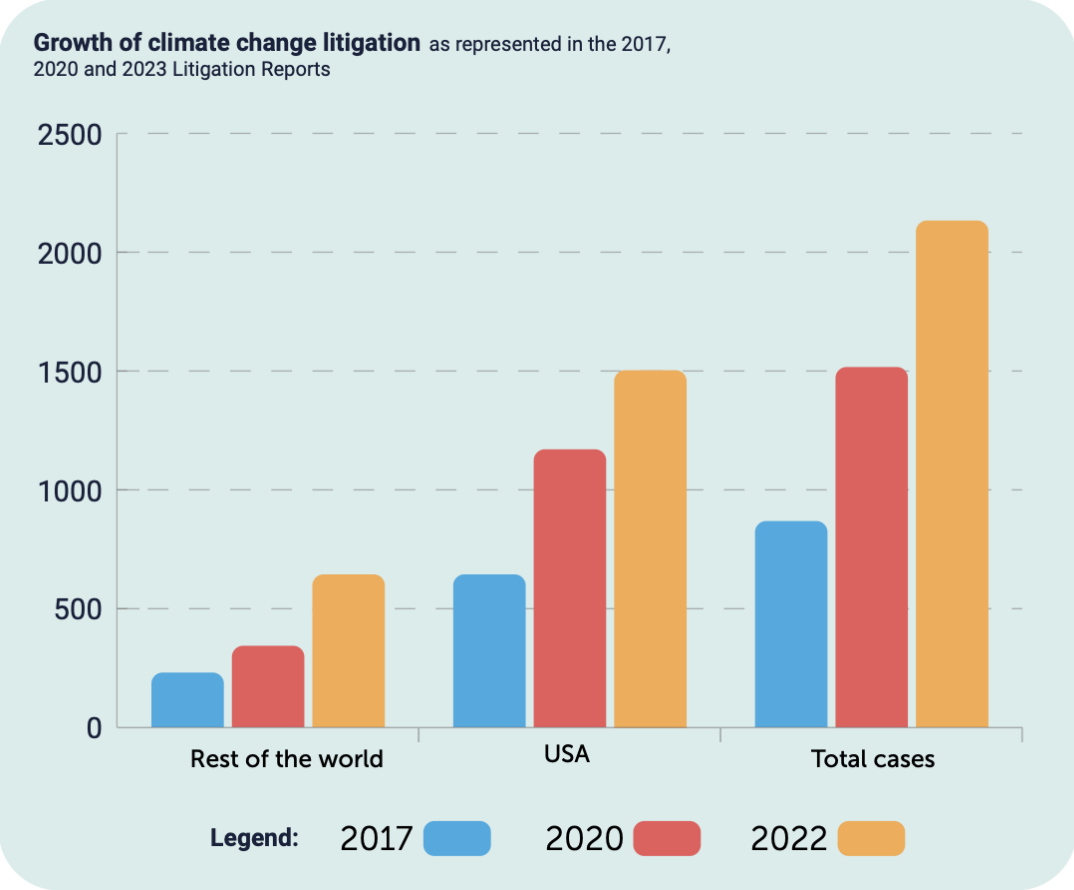
- **Heterogenous group of cases**
- **Climate litigation: critical component of climate governance**
- According to IPCC, **climate litigation can affect "the outcome and ambition of climate governance"**

Figure 2.



United Nations Environment Programme (2023). *Global Climate Litigation Report: 2023 Status Review*. Nairobi.

Databases

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- **Sabin Center for Climate Change Law, Columbia University**
  https://climatecasechart.com
  - 2,851 cases of which 1,884 cases in the USA
  - 70% filed since 2015

- **Australian Climate Change Litigation database** – Centre for Resources, Energy and Environmental Law, University of Melbourne
  https://law.app.unimelb.edu.au/climate-change/index.php

- **Climate Change Laws of the World** – Grantham Research Institute on Climate Change and the Environment, LSE
  http://climatecasechart.com/search-non-us/

Sabin Center for Climate Change Law

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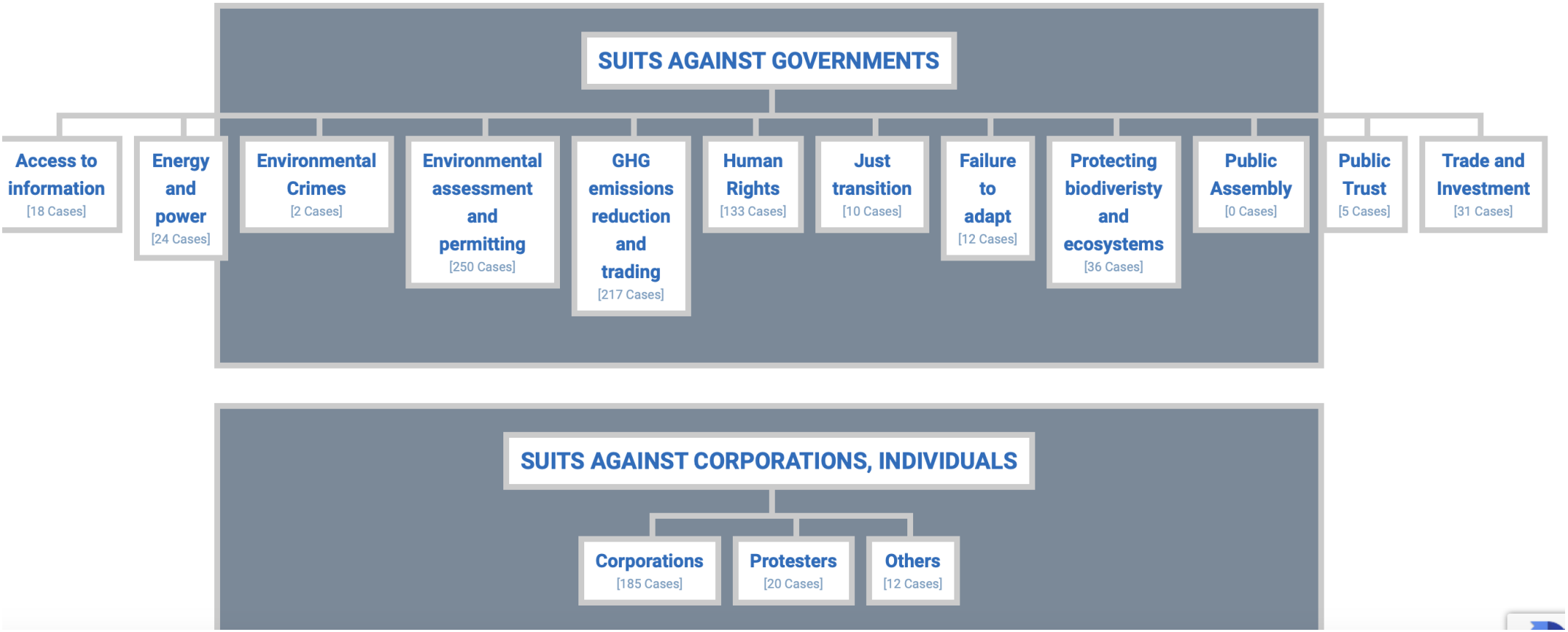
Global Climate Change Litigation

The Global Climate Change Litigation Database includes all cases except those in the U.S.

You may also browse by Jurisdiction or by Principal Law.



Annual status reports

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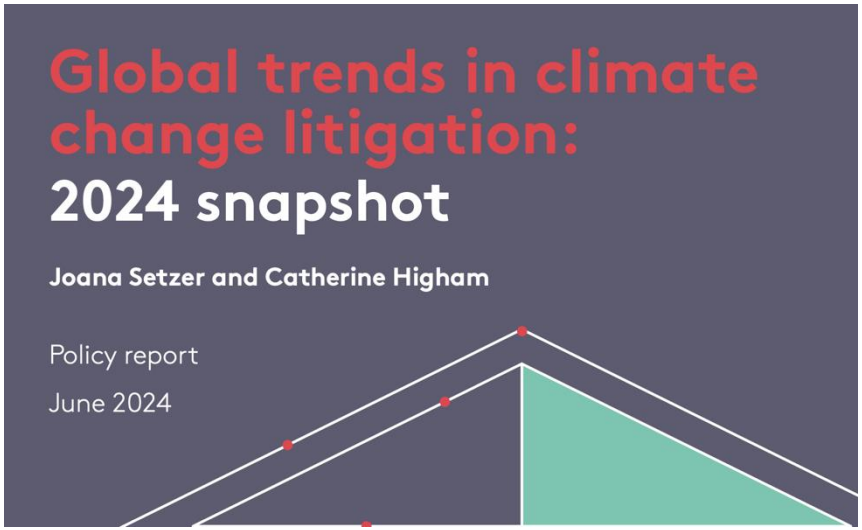
- **London School of Economics**

https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2024/06/Global-trends-in-climate-change-litigation-2024-snapshot.pdf



‘

- **UNEP**

https://www.unep.org/resources/report/global-climate-litigation-report-2023-status-review

Types

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- **Strategic vs routine cases**
- **Proactive/pro-regulatory litigation / climate-aligned cases**
- **Reactive/ anti-regulatory litigation**
  - just transition cases (distributional impacts of policies)
  - ESG backlash litigation
- **Vertical vs horizontal cases**

Often not included cases where climate is incidental:
air quality, renewable energy cases

Photo by Mika Baumeister on Unsplash

Sources of law (cause of action)

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- **Violations of international law**
  - (e.g. *Inuit* petition)
- **International norms for interpretive purposes**
  - (e.g. *Urgenda*)
- **National law**
  - (e.g. Clean Air Act in the USA; constitutional rights)

Fora

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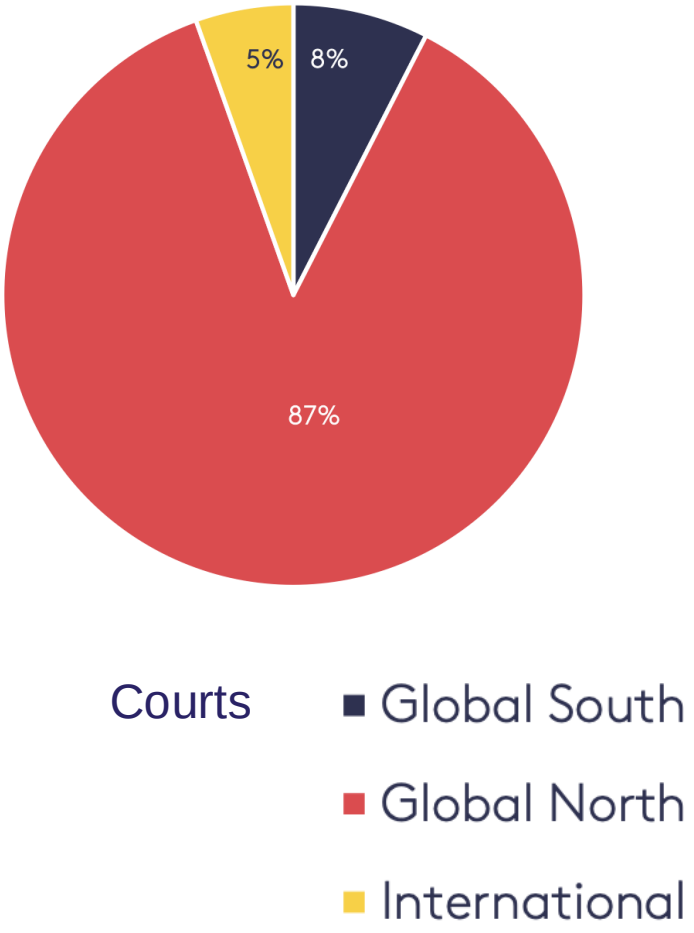
- ICJ
- ITLOS
- WTO's dispute settlement panels and Appellate Body
- ICSID
- Permanent Court of Arbitration
- Regional human rights tribunals
- National courts
- National non-judicial bodies

- Jurisdiction
- Standing
- Separation of powers



Source: Setzer J and Higham C (2024) *Global Trends in Climate Change Litigation: 2024 Snapshot.* London: Grantham Research Institute on Climate Change and the Environment, London School of Economics and Political Science.

Landmark cases

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- ***Urgenda Foundation v Netherlands*** (2019, **Supreme Court, the Netherlands**)
- ***Inuit* petition** (Sheila Watt-Cloutier et al. v United States, **Inter-American Commission on Human Rights**, Petition 7 December 2005)
- ***Children v. Climate Crisis*** (Sacchi et al. v Argentina et al., **United Nations Committee on the Rights of the Child**, Petition 12 October 2021)
- ***Union of Swiss Senior Women for Climate Protection v. Swiss Federal Council and Others*** (2024) (**European Court of Human Rights)**

From Urgenda to responsibility of private companies

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Urgenda Foundation v Netherlands (2019, Dutch Supreme Court):

- The world's **first case** to establish a **government's legal duty** to prevent dangerous climate change
- Claimants claimed that that Dutch **national GHG policies were insufficient** to address national mitigation obligations
- The claim relied on **the right to life and right to respect for private and family life** of the European Convention on Human Rights as integrated in Dutch law
- The court established that **the state has an enforceable obligation to protect human rights** → to reduce GHG emissions → **to limit** global warming to an average of **1.5°C**
- The Netherlands to reduce GHG emissions by 25% relative to 1990 by 2020

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Climate corporate cases

History

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- Early examples of climate litigation were filed in the US and focused on fossil fuel companies, e.g.
  - **2008 *Village of Kivalina v Exxon Mobil*,**
  - **2004 *Eight States and NYC versus US Utilities***
  - **2006 *California v General Motors***
  - Not successful: political question doctrine; federal statutes such as the Clean Air Act

- **2014** Carbon Majors – 90 entities (fossil fuel and cement companies) – responsible for 63% of CO2 and methane emitted between 1751 and 2010 (Richard Heede and the Climate Accountability Institute)

- **2015** Paris Agreement

- New geographies and claims against diverse companies

- **2021** judgment in ***Milleudefensie v Shell***

Corporate climate litigation

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- Climate change poses 3 principal risks for companies:
  - Physical
  - Transitional
  - Liability

- **Systemic mitigation cases**
  - ***Mileudefensie v Shell*** (Netherlands) (prospective corporate strategy and business model to align with PA and human rights)
  - ***Carbon Majors Inquiry*** before the Philippines Human Rights Council

- **Corporate adaptation cases**
  - ***Lliluya v RWE*** (Germany) (historic responsibility but costs to adapting to future climate harm)
  - Attribution science (causation)

- **Climate-washing -** disputes over climate disinformation by companies (consumers) and disclosures

Categorization - Sabin Centre

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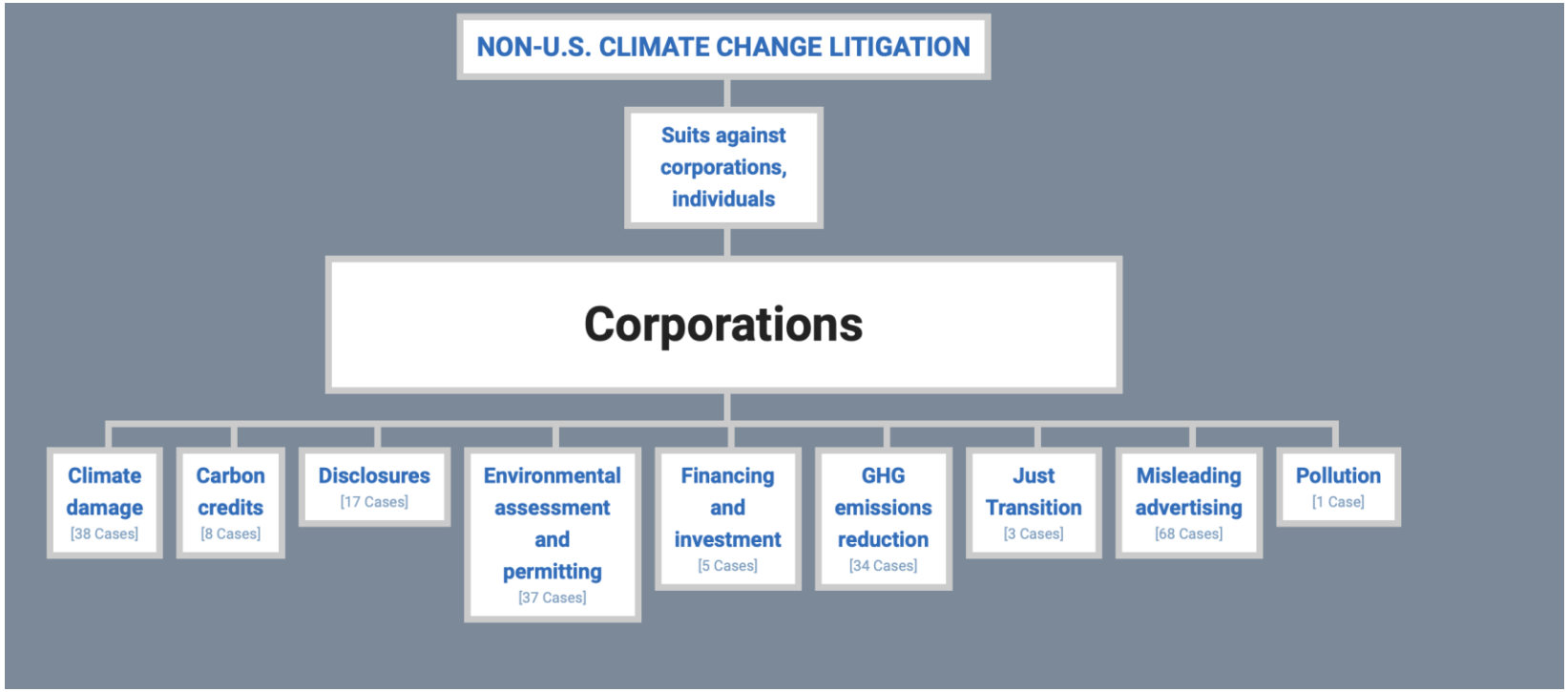
- **Global cases (without US)**
  - 216 cases (as at 10 October 2024)
  - 9 categories



Categorization - Australian and Pacific climate litigation

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- **Australian Climate Change Litigation database**
  - 100 cases as at 5 November 2024
  - 7 categories

SELECT LITIGATION TYPE:

+ Access to Justice

+ Constitutional and Human Rights / State Accountability

× Corporate Accountability

Carbon credits and offsets	10 cases
Environmental harm	6 cases
Misleading and deceptive conduct	24 cases
Negligence and nuisance	3 cases
Other	21 cases
Renewable energy	3 cases
Transparency and disclosure	33 cases
View all 100 cases.	

+ Project Approval - Adaptation

+ Project Approval - Mitigation

Milieudefensie v Shell – introductory remarks

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- **Horizontal action**: climate action under private law brought by private parties against private parties
- An action **to protect global climate** (it did not concern a specific project) but was directed against the effects of private activity on climate change
- The defendant was one of Carbon Majors ("a major player in the worldwide market of fossil fuels")
- International human rights to inform interpretation of duty of care
- Judgment of the first instance declared provisionally enforceable

Milieudefensie v Shell (1st instance court in Hague)

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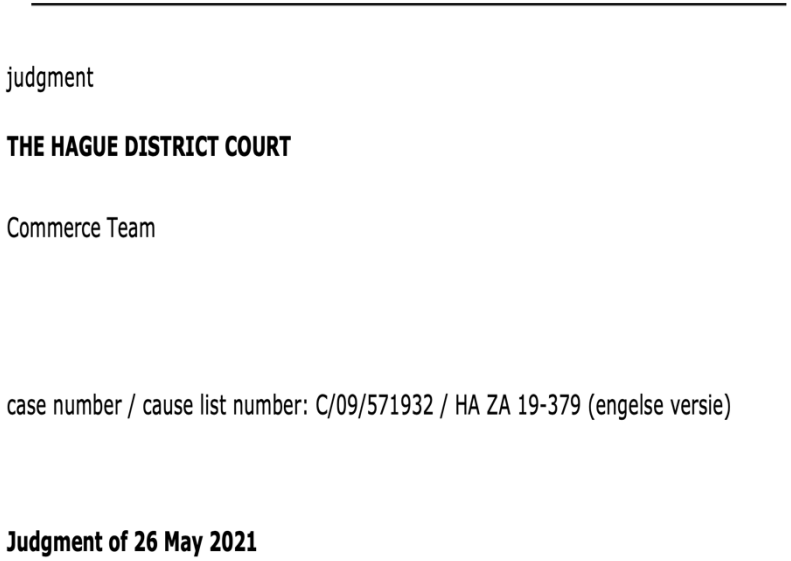
- **Defendant:** Royal Dutch Shell plc (RDS) → a company seated in the Netherlands - Shell Group's policymaker
- Dutch tort law, based on 'duty of care'
- **Claim:** 45% reduction from 2019 levels by 2030
- **Judgment: 26 May 2021**
- The **first time** a private company is ordered to comply with the Paris Agreement



judgment

THE HAGUE DISTRICT COURT

Commerce Team

case number / cause list number: C/09/571932 / HA ZA 19-379 (engelse versie)

Judgment of 26 May 2021

in the case of

Decision of the appellate court is awaited on 12 November 2024

Milieudefensie v Shell

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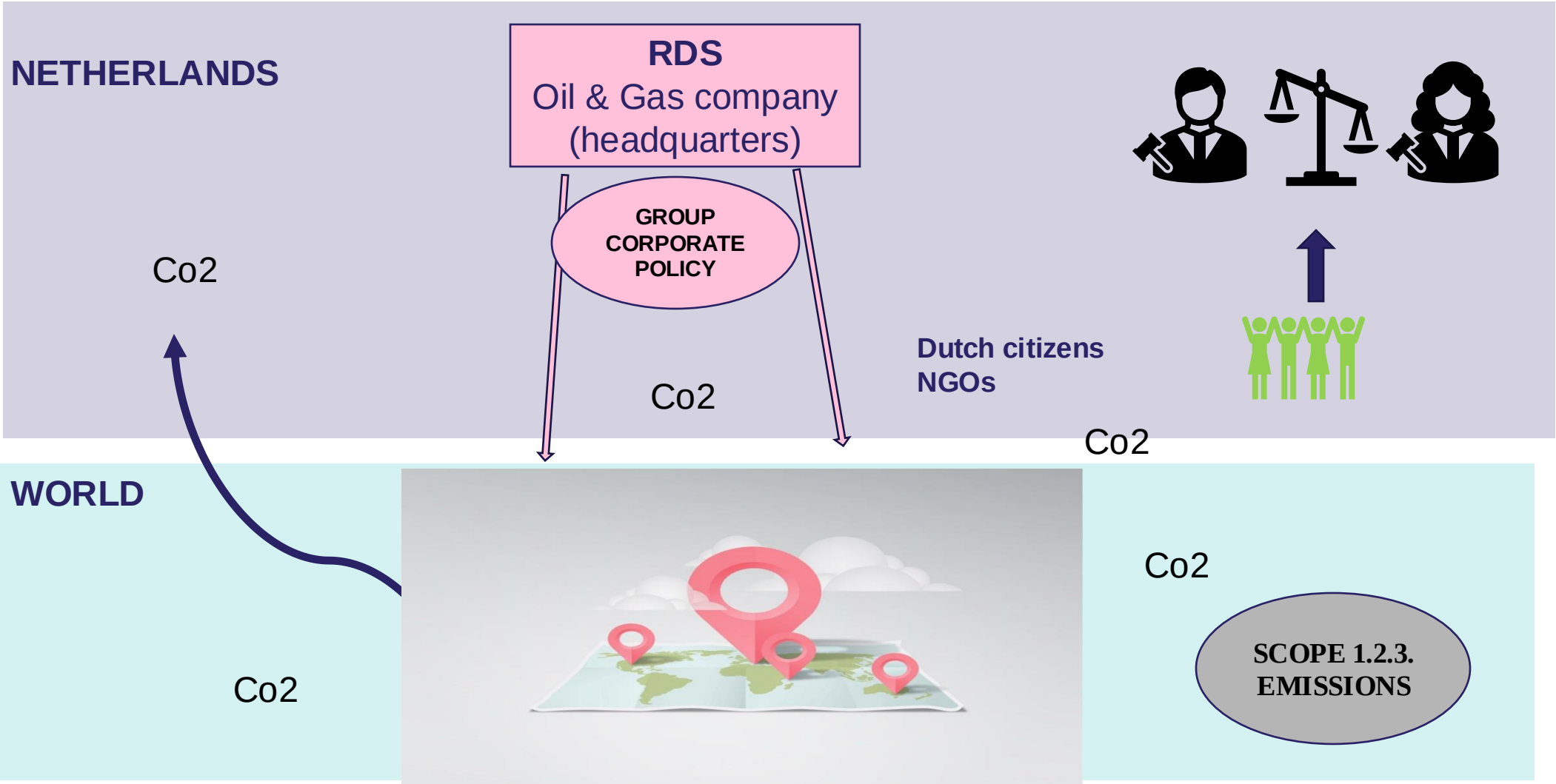

Photo by Victor Adapter on Unsplash

Carbon accounting

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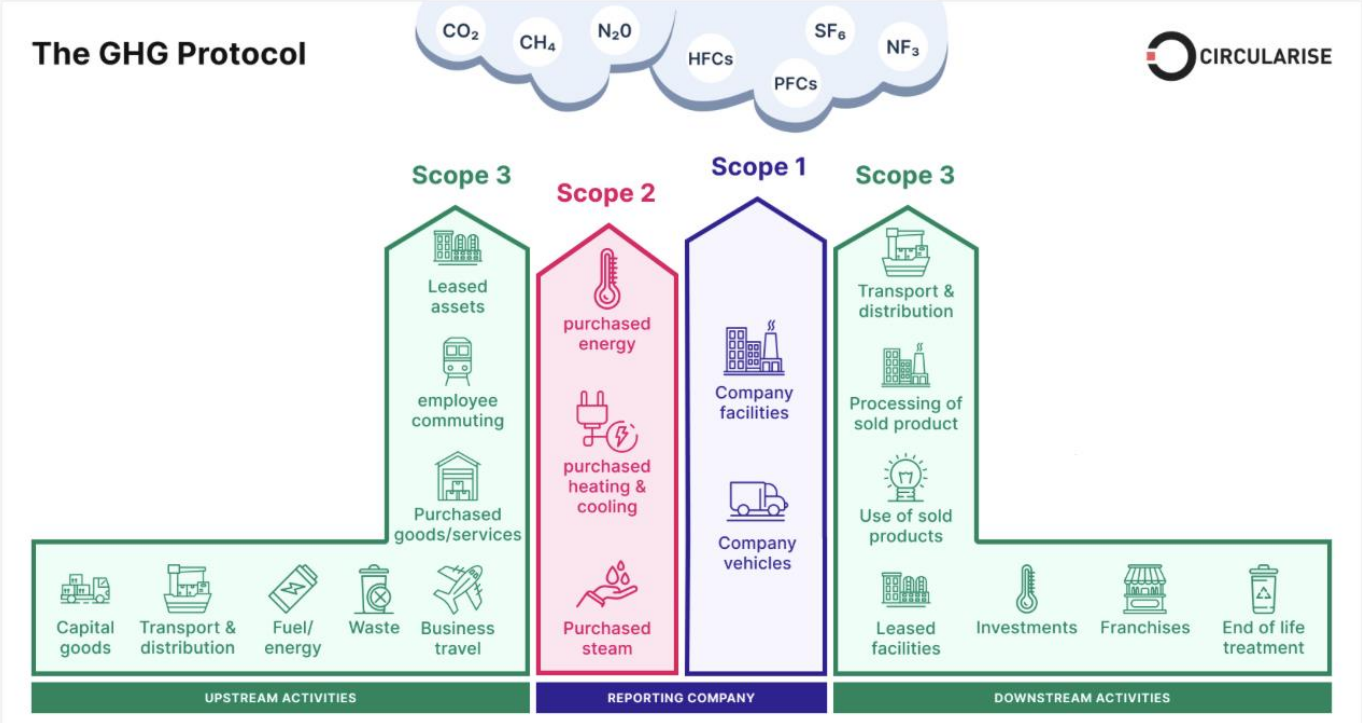
- **Scope 1:** direct GHG emissions from sources that are owned or controlled by the undertaking
- **Scope 2:** indirect emissions from the generation of purchased or acquired electricity, steam, heat or cooling consumed by the undertaking
- **Scope 3:** indirect GHG emissions that occur in the value chain of the undertaking, including upstream and downstream emissions (for many companies may be the main component of their GHG emissions)



Source: Circularise

Milieudefensie v Shell - 1st instance judgment:

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- Shell's reduction obligation ensues from the **unwritten standard of care laid down in Dutch Civil Code**
- **In its interpretation** of the standard, the court has included: [..] (4.) the right to life, the right to respect for private and family life of Dutch residents.. (5.) **the UN Guiding Principles** (out of 14 factors)
- Rights enshrined in ECHR and ICCPR **cannot be directly invoked against Shell…**the court will factor them in in its interpretation of the standard of care
- **Obligation of result** for Scope 1 emission (own activities)
- **Best efforts reduction obligation** for Scope 2 and Scope 3 emissions (value chain)
  - approx. 85% of Shell's total emissions are scope 3

Luciano Lliuya v RWE

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- **Adaptation + damage**
- **German court, pending – on appeal, 2015**
- **Claimant:** Peruvian farmer
- **Respondent:** Germany's largest electricity producer
- Liability of greenhouse gas emitter for harms arising in different jurisdiction from warming effects of climate change arising in a different jurisdiction.
- General "nuisance" provision of the German Civil Code

- **Prayer for relief:**
  - Declaration
  - Payment of a proportionate share of the costs for adapting the farmer's village to climate impacts

Asmania v Holcim (Four Islanders of Pari v. Holcim)

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- **Mitigation + adaptation + damage**
- **Swiss court, pending, 2022**
- **Claimants:** 4 Indonesian inhabitants of Pari island
- **Respondent:** “Carbon Majors”, cement company
- New Richard Heede study – 0,42% of global industrial CO2 emissions since 1750 is attributable to the respondent
- Article 28 of the Swiss Civil Code (infringement of personal rights) and Article 41 of the Code of Obligations (redress for unjust harm)

- **Prayer for relief:**
  - reduction of CO^2 emissions by 43 % by 2030 and by 69% by 2040, relative to 2019 levels
  - payment of a proportionate share of the costs for adapting the island to climate impacts
  - damage suffered to their homes as a result of floods in 2021

State of California against 13 fossil fuel companies and the American Petroleum Institute

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- **Adaptation**
- **California Trial Court, pending, 2023**
- **Claimant:** California (state and local government)
- **Respondent:** 13 fossil fuel companies
- Claims that the defendants concealed and misrepresented the risks of climate change and caused the plaintiffs climate change injuries
- California law: statutory causes of action for public nuisance, equitable relief for pollution, impairment and destruction of natural resources, untrue or misleading advertising, misleading environmental marketing, and unlawful, unfair, or fraudulent business practice

- **Prayer for relief:**
  - to establish and contribute to an abatement fund to abate the nuisance
  - compensatory damages
  - civil penalties

Climatewashing – corporate commitments

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- **Specific type of misinformation associated with climate change**
- **Corporate climate commitments / net-zero pledges**
- ***Australasian Centre for Corporate Responsibility v Santos*, 2021** representations that natural gas is a clean fuel and that the company has a credible net zero emissions plan (corporate and consumer law)
- ***Greenpeace France v TotalEnergies*, 2022** (Total's claims to be aiming for net-zero by 2050 and becoming a major player in energy transition, 'rebrand' to TotalEnergies) (consumer law)

Conclusion / prospects for the future

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- Corporate climate litigation will continue
  - with the increase of legislation we can anticipate increase in new types of cases
  - e.g. corporate governance rules, corporate human rights and environmental due diligence rules
- Potential claims challenging over-reliance by governments/private actors on carbon dioxide removal technologies to achieve net zero emissions
- Need to address implementation gap
- Counteraction by companies
  - *TotalEnergies v Greenpeace France*
  - *ENI v Greenpeace Italy and Recommon* (damages for defamation)

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Thank you for your attention!

Questions & Comments

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